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No.

IN THE
SUPREME COURT OF THE UNITED STATES

BE&K CONSTRUCTION CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ of Certiorari To The
United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the National Labor Relations Board and the court of appeals erred in eliminating First Amendment protection for lawsuits which are not objectively baseless, when other courts of appeals have found that the NLRB standard departs from the test set forth by this Court in *Professional Real Estate Investors v. Columbia Pictures Industries,* 508 U.S. 49 (1993).

2. Whether the NLRB and the court of appeals erred in ruling that an employer violates Sections 7 and 8(a)(1) of the National Labor Relations Act by bringing a good faith but ultimately non-prevailing lawsuit against a non-employee labor organization, contrary to the explicit language of this Court in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), and contrary to the holdings of other courts of appeals.

3. Whether the court of appeals erred in upholding the NLRB's finding of the required element of "retaliatory motivation," under a rationale not articulated by the Board itself, in conflict with *NLRB v. Yeshiva University,* 444 U.S. 672, 685, n.22 (1980), and in further conflict with the holding of *Bill Johnson's Restaurants v. NLRB, supra,* and numerous appellate court decisions.

4. Whether the National Labor Relations Board and the court of appeals erred in awarding attorneys fees to a labor organization, where the Ninth Circuit had expressly rejected any award of attorneys fees in the same lawsuit, *USS-POSCO Ind. v. Contra Costa Cty. Bldg. and Const. Trades Council,* 31 F. 3d 810 (9th Cir. 1994), and where the award of attorneys fees under Section 8(b)(4) of the NLRA conflicts directly with this Court's holding in *Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners*, 456 U.S. 717 (1982).

LIST OF PARTIES TO PROCEEDINGS IN THE COURT OF APPEALS AND CORPORATE DISCLOSURE STATEMENT

The Petitioner in this case is BE&K Construction Corp. ("BE&K"), a Delaware corporation. Petitioner is not related to any other publicly held or publicly traded companies under Supreme Court Rule 29.6.

Respondent in this case is the National Labor Relations Board ("NLRB").

Intervenors in this action before the court of appeals were the Steamfitters Local 342, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO and Local 302, International Brotherhood of Electrical Workers, AFL-CIO and District Council of Iron Workers of the State of California and Vicinity, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Contra Costa County Building And Construction Trades Council, AFL-CIO and Northern California District Council Of Laborers, Laborers International Union Of North America, AFL-CIO and Bay Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO and Local Union No. 378, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Cement Masons Union Local No. 825, Operative Plasterers and Cement Masons International Association, AFL-CIO and Local No. 549, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES AND CORPORATE DISCLOSURE .. iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS . 2

STATEMENT OF THE CASE 2

REASONS FOR ALLOWING THE WRIT 5

I. This Court's Intervention Is Required To Correct A Double Standard By Which Lawsuits Are Being Afforded Far Less First Amendment Protection Under The NLRA Than Is Uniformly Applied Under Other Statutes. 5

II. The Decisions Below Have Improperly Extended Protections of the NLRA To Non-Employee Labor Organizations, In Defiance Of This Court's Holding In *Lechmere Stores v. NLRB.* 14

III. The Writ Should Be Granted In Order To Resolve A Conflict Within The Circuits Regarding The Findings Necessary To Establish "Retaliatory Motivation" Under *Bill Johnson's* 17

IV. The Writ Should Be Granted In Order To Resolve The Direct Conflict Between The Sixth And Ninth Circuits Regarding The Award Of Attorneys Fees As A Remedy In This Case 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

BE&K Construction Co. v. NLRB, 246 F. 3d 619 (6th Cir. 2001) ..... passim

BE&K Construction Co., 329 NLRB No. 68 (Sept. 30, 1999) ..... passim

Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983) ..... passim

Braum Elec. Co., Inc., 324 NLRB 1 (1997) 8

California Motor Transport Co., Inc. v. Trucking Unlimited, 404 U.S. 508 (1972)..... 6,7

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 8

Diamond Walnut Growers, Inc. v. NLRB, 53 F. 3d 1085 (9th Cir. 1995)..... 9,13

Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 6

Eastex, Inc. v. NLRB, 437 U.S. 556 (1978) 13

Johnson & Hardin Co. v. NLRB, 49 F. 3d 237 (6th Cir. 1996) 12,15,18

J.P. Stevens, 268 NLRB 8 (1963).....17

Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) ..... i, 5, 14

McDonald v. Smith, 472 U.S. 479 (1985)..... 6

NLRB v. Alan Motor Lines, Inc.,937 F. 2d 887 (3d Cir. 1991) 15

NLRB v. Columbia University, 541 F. 2d 922 (2d Cir. 1976) 15

NLRB v. Donna-Lee Sportswear Co., Inc., 836 F. 2d 31 (1st Cir. 1987) 17

NLRB v. Heyman, 541 F. 2d 796 (9th Cir. 1976).....17

NLRB v. Local 520, IUOE, 15 F.3d 677 (7th Cir. 1994) 14,16

NLRB v. Vanguard Tours, Inc., 981 F. 2d 62 (2d Cir. 1992) 10,14

NLRB v. Yeshiva University, 444 U.S. 672 (1980) ..... i, 4, 15

Petrochem Insulation, Inc., 330 NLRB No. 10 (1999)..... 9

Petrochem Insulation, Inc. v. NLRB, 240 F. 3d 26 (D.C. Cir. 2001) 10, 14

Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49 (1993)..... i,4,5,7,9

Speedrack Products Group, LTD. v. NLRB, 114 F. 3d 1276 (D.C. Cir. 1997) 15

Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners, 456 U.S. 717 (1982)..... ii,5,17

United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967)..... 6

United Mine Workers v. Pennington, 381 U.S. 657 (1965)...6

USS-POSCO Ind. v. Contra Costa Cty. Bldg. and Const. Trades Council, 31 F. 3d 810 (9th Cir. 1994)..... passim

White v. Lee, 227 F. 3d 1214 (9th Cir. 2000)..... 8,9,10,12

STATUTES

28 U.S.C. § 1254.....2

29 U.S.C. §152.....12

29 U.S.C. § 157 2,12

29 U.S.C. § 158(a)(1) 2,6,12,14

29 U.S.C. § 158(b)(4) 2,3

29 U.S.C. § 160(c) 2

29 U.S.C. § 187.....2,3,17

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OPINIONS BELOW

The ruling of the United States Court of Appeals for the Sixth Circuit as to which the writ is being sought is reported as *BE&K Construction Co. v. NLRB*, 246 F. 3d 619 (6th Cir. 2001), rehearing en banc den. (June 28, 2001) (App. 1a). That decision enforced an Order of the National Labor Relations Board reported as *BE&K Construction Co.*, 329 NLRB No. 68 (Sept. 30, 1999)(App.28a). A related decision of the Court of Appeals for the Ninth Circuit is reported as *USS-POSCO Indus. v. Contra Costa County Bldg. & Const. Trades Council, AFL-CIO*, 31 F. 3d 800 (9th Cir. 1994).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. Rehearing en banc was denied by the court of appeals on June 28, 2001 (App. 26a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, First Amendment

29 U.S.C. § 157

29 U.S.C. § 158(a)(1)

29 U.S.C. § 158(b)(4)

29 U.S.C. § 160 (c)

29 U.S.C. §187.

STATEMENT OF THE CASE

This Petition arises from the Sixth Circuit's denial of Petitioner's appeal from an Order of the NLRB. The NLRB held that Petitioner BE&K violated Section 8(a)(1) of the NLRA by filing and maintaining a civil lawsuit seeking to halt misconduct threatening BE&K's business which had been engaged in by a group of non-employee unions. BE&K, a construction contractor, and its client USS-POSCO Industries ("UPI") brought suit in federal court in response to a series of unsupported regulatory challenges, frivolous lawsuits, violence and other union tactics aimed at driving non-union BE&K off of a large UPI construction project in Contra Costa County, California. *USS-POSCO Ind. and BE&K Construction Co. v. Contra Costa County Bldg. &*

Constr. Trades Council, AFL-CIO, et al., No. C-87-4829 DLJ (the "*USS-POSCO*" action).

BE&K did not sue any employees, but only sued non-employee labor organizations. Further, none of the unions sued by BE&K represented any of BE&K's employees or claimed to be acting on behalf of BE&K's employees. BE&K's complaint under Section 303 of the Labor Management Relations Act, 29 U.S.C. § 187, alleged that the unions' actions violated Section 8(b)(4) of the Labor Management Relations Act, 29 U.S.C. 158(b)(4). BE&K later amended its complaint to allege that the unions violated the Sherman Act, 15 U.S.C. 1.

The district court limited BE&K's discovery and, applying a standard later found to be improper by the court of appeals, dismissed or granted summary judgment against BE&K's claims. BE&K appealed to the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit reversed the district court's legal analysis but upheld the judgment against BE&K on the slimmest of margins – the fact that a slight majority (15 of 29) of the unions' actions against BE&K had proven successful in some measure. See *USS-POSCO*, 31 F.3d at 810. But for that fact, according to the Court of Appeals opinion, much of the union activity alleged in BE&K's complaints would not have been protected from the antitrust laws. *Id.*

The district court had ordered BE&K to pay the unions' attorneys fees as a sanction for maintaining the suit. The Ninth Circuit expressly reversed this order, instead finding that the Petitioner had acted in good faith and that the unions were not entitled to any award of attorneys fees against BE&K. *USS-POSCO Ind. v. Contra Costa Cty. Bldg. And Const. Trades Council*, 31 F. 3d 810 (9th Cir. 1994).

Subsequently, the NLRB's General Counsel asserted that BE&K's suit against the unions violated Section 8(a)(1) of the Act. Acting without a hearing on a motion for summary judgment, the Board agreed. On September 30, 1999, the NLRB found that BE&K's suit "lacked merit" (solely in the sense that BE&K did not "prevail") and was brought in retaliation for the unions having engaged in activities protected by Section 7 of the Act. The NLRB accordingly ordered BE&K, *inter alia*, to reimburse the unions for all legal and other expenses incurred in defending against the *USS-POSCO* litigation. (App. 28a).

On April 9, 2001, the U.S. Court of Appeals for the Sixth Circuit affirmed the Board's decision. The court held that dicta in this Court's decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), justified application of a different First Amendment standard for protecting the right of access to the courts under the National Labor Relations Act, than the standard set forth by the Court more recently in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993).

The Sixth Circuit further found that the right of unions to claim reimbursement and protection under Sections 7 and 8(a)(1) of the Act is indistinguishable from the rights of employees under these provisions, notwithstanding this Court's decision to the contrary in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

The court of appeals further upheld the NLRB's finding that BE&K filed its suit with "retaliatory motive." However, the court did so on a basis not articulated by the agency itself, in violation of the holdings of *NLRB v. Yeshiva University*, 444 U.S. 672, 685, n.22 (1980), *Bill Johnson's Restaurants v. NLRB, supra*, and numerous other conflicting decisions.

Finally, the court found that the remedy of awarding attorneys fees to the unions was appropriate, despite the Ninth Circuit's prior rejection of just such an award in the same litigation. *USS-POSCO, supra*, 31 F. 3d at 811-812. Included in the court's award (and the NLRB's) are fees spent in connection with litigation under Section 8(b)(4) of the Act, which this Court expressly held should not be awarded to prevailing parties under that statute in *Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners*, 456 U.S. 717 (1982).

REASONS FOR ALLOWING THE WRIT

I. This Court's Intervention Is Required To Correct A Double Standard By Which Lawsuits Are Being Afforded Far Less First Amendment Protection Under The NLRA Than Is Uniformly Applied Under Other Statutes.

This case is the culmination of a series of NLRB and court decisions which have created a dangerous anomaly in the law threatening the entire business community's right of access to the courts on labor issues. By upholding the NLRB's award of attorneys fees to the unions against BE&K, the Sixth Circuit has grossly distorted the holding of *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). As a result, the court of appeals has undercut vital First Amendment protections which this Court found to be paramount in *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993).

The Court has described the right to petition as "among the most precious of the liberties safeguarded by the Bill of Rights" and "intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press." *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). "[E]xcept in the most

extreme circumstances citizens cannot be punished for exercising this right 'without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions...'" *McDonald v. Smith*, 472 U.S. 479, 486 (1985)(Brennan, J., concurring).

In *California Motor Transport Co., Inc. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), the Court extended the *Noerr-Pennington* doctrine[1] to protect the right of citizens to bring actions before administrative agencies and in the courts. The Court held that such actions were immunized by the First Amendment from statutory liability, unless they were mere "shams," i.e., objectively baseless.

In *Bill Johnson's Restaurants v. NLRB, supra*, the Court made clear that the same First Amendment principles applied to litigation challenged under the National Labor Relations Act. Expressly citing *California Motor Transport*, the Court held that "the Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law." 461 U.S. at 748.

In *dicta*, the *Bill Johnson's* Court briefly opined that "[i]f judgment goes against the employer in the ... court, however, or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the § 8(a)(1) and § 8(a)(4) unfair labor practice case.... Id. at 747. However, the Court nowhere addressed in *Bill Johnson's* the First Amendment standard which should apply to such post-judgment unfair labor practice cases.

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[1] *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965),

Subsequently, in *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993), the Court clarified the standard for protecting litigants' rights under the First Amendment, as follows:

> Since *California Motor Transport*, we have consistently assumed that the sham exception contains an indispensable objective component .... Whether applying *Noerr* as an antitrust doctrine *or invoking it in other contexts*, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham .... Indeed, by analogy to *Noerr*'s sham exception, we held that even an "improperly motivated" lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is "baseless."

Id. at 58-59, citing *Bill Johnson's Restaurants* (emphasis added).

Since *Professional Real Estate Investors*, it should thus be clear that "whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts," a lawsuit is protected by the First Amendment from statutory liability unless it is "objectively baseless." As the Court further explained, "objectively baseless" and "nonmeritorious" are synonymous terms which both mean that "no reasonable litigant could realistically expect success on the merits" at the time a suit is filed. The Court expressly held that "when the ... defendant has lost the underlying litigation, a court must 'resist the understandable temptation to engage in post hoc reasoning by concluding' that an ultimately unsuccessful 'action must have been unreasonable or without foundation.'...The court must remember that 'even when the

law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.'" *Id.* at 61, n.5, quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-422 (1978).

Notwithstanding the clearly expressed intention of the Court to establish a uniform First Amendment standard immunizing lawsuits from *all* forms of statutory liability, the NLRB and several courts of appeals have misapplied the *Bill Johnson's* dicta to carve out a wholly unwarranted exception from *Professional Real Estate Investors*. *See BE&K Construction Co.*, 329 NLRB No. 68 (1999) (App. 43a); *see also Petrochem Insulation, Inc.*, 330 NLRB No. 10, *10-11 (1999); *Braum Elec. Co., Inc.*, 324 NLRB 1 (1997). The Sixth Circuit committed the same error, declaring erroneously that *Professional Real Estate Investors* "involved only a claim of *Noerr-Pennington* immunity from *antitrust* liability." (App. 19a)(emphasis in original). According to the court of appeals, *Bill Johnson's* creates a "bifurcated system of analysis in determining the protections to be afforded an employer for filing retaliatory lawsuits against employees and unions." "Following a court determination … there is no longer a need to prevent interference with the First Amendment right to seek judicial redress." *Id.*

Unlike the Sixth Circuit, two other courts of appeals have raised serious questions about the double standard created by the NLRB's interpretation of the *Bill Johnson's dicta*, in light of the subsequent holding in *Professional Real Estate Investors*. Both courts ultimately upheld the NLRB's position, but both called upon this Court to clarify this critically important anomaly in the law.

In *White v. Lee*, 227 F. 3d 1214 (9th Cir. 2000), a case decided under the Fair Housing Act, the court was nevertheless called upon to address the apparent conflict created by the two Supreme Court decisions. The court declared that, but for a prior holding by another circuit panel

in *Diamond Walnut Growers, Inc. v. NLRB*, 53 F. 3d 1085, 1088 (9th Cir. 1995), the court would "ordinarily be tempted to treat these statements in *Bill Johnson's* as *dicta*, because they were not pertinent to the case before the Court and because in *Professional Real Estate Investors*, decided ten years later, the Court did not even mention the *Bill Johnson's* statements when holding that unsuccessful lawsuits receive the traditional protection described in *California Motor Transport*, specifically including the requirement of objective baselessness." *See White v. Lee, supra*, 227 F. 3d at 1235-36.

The *White* court reemphasized this point in its footnote 18, as follows:

> Particularly notable is the fact that in *Professional Real Estate Investors,* the Court cited the holding in *Bill Johnson's* that "by analogy to *Noerr's* sham exception, . . . even an 'improperly motivated' lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is 'baseless.'" 508 U.S. at 59. However, rather than applying or even citing the subsequent *Bill Johnson's* statements regarding unsuccessful lawsuits, the Court emphasized that a litigant's failure to prevail did *not* establish the objective baselessness of his suit, and it proceeded to apply *Noerr-Pennington* immunity to an action that had in fact been defeated on summary judgment. Had the Court believed that the statements in *Bill Johnson's* had any effect, we would expect that it would have explained why it did not apply them in the case before it. The fact that the Court did not do so indicates that it considered the statements dicta.

White v. Lee, supra, 227 F. 3d at 1235, n.18.

More recently, while upholding another NLRB decision relying on *Bill Johnson's* in the face of *Professional Real Estate Investors*, the Court of Appeals for the D.C. Circuit expressed significant reservations over the substantial limits on First Amendment protections caused by the Board's view of the law. The D.C. Circuit strongly suggested that this Court should take up and clarify the differing standards.

> We understand that [the NLRB's interpretation]sets the bar for sham litigation – litigation not protected by the First Amendment – lower than in *Noerr Pennington* cases; on proof of retaliation, employer suits that are better than baseless under *Noerr-Pennington* (ones for which "there is any realistic chance that the plaintiff's legal theory might be adopted" id at 747) may evidently be classified as sham litigation after the employer-plaintiff loses. Perhaps the Supreme Court will one day create a uniform standard for sham litigation governing both the NLRA and non-NLRA cases (or explain why the First Amendment protects erring litigants less in the NLRA context than others), but until that day, the language in *Bill Johnson's* must control.

Petrochem Insulation, Inc. v. NLRB, 240 F. 3d at 32.

The Sixth Circuit decision also conflicts directly with the Second Circuit opinion in *NLRB v. Vanguard Tours, Inc.*, 981 F. 2d 62 (2d Cir. 1992). There the Second Circuit declined to accept the Board's method of determining lack of "merit" in the case of a withdrawn lawsuit (for which the test

of merit under *Bill Johnson's* is listed in the same category as a judicially determined judgment). The *Vanguard* court held:

> Because the Board did not find that Vanguard's suit lacked a reasonable basis in fact or law, either at the outset or at the point when the employer briefly permitted it to remain pending, the Board's determination that the lawsuit was an unfair labor practice may not be sustained.

Id. at 66.

In the present case, it was undisputed before the NLRB that, at the time BE&K filed its lawsuit, the Company had a reasonable belief that it would prevail. Numerous antitrust experts advised the Petitioner to pursue its antitrust claims, and the NLRB's own General Counsel found nearly identical facts to state a claim under Section 8(b)(4). A law review article used BE&K's experience as a case study of anticompetitive union activities. Durie & Lemley, 80 Cal. L. Rev. at 759-62. Finally, the Ninth Circuit itself declared the unions' activities against BE&K to be "troublesome," finding that "we cannot say that pursuing legitimate labor goals through this kind of activity [pressing frivolous lawsuits, automatically protesting against permits sought by BE&K, etc] is per se exempted from the antitrust laws." *USS-POSCO, supra*, 31 F. 3d at 809.

Under these circumstances, the failure of the Sixth Circuit to apply First Amendment protection to BE&K's litigation demonstrates the fallacy of the NLRB's interpretation of the *Bill Johnson's* dicta. The court of appeals decision fundamentally chills the right of employers everywhere to petition the courts in defense of their businesses.

Only this Court can correct the anomaly which now exists as a result of the NLRB's undermining of the

Professional Real Estate Investors standard. The writ should be granted so that uniformity of the law can be reestablished by the Court.

II. The Decisions Below Have Improperly Extended Protections of the NLRA To Non-Employee Labor Organizations, In Defiance Of This Court's Holding in *Lechmere Stores v. NLRB*.

Section 8(a)(1) of the NLRA states that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce ***employees*** in the exercise of the rights guaranteed in section 157 of this title." (emphasis added). The rights guaranteed by Section 7 (29 U.S.C. § 157) are likewise addressed only to "employees," as this Court squarely held in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992).

It is undisputed that BE&K here took no adverse action of any kind against "employees." All that BE&K did was pursue a lawsuit against a group of labor organizations.[2] By the plain terms of Section 8(a)(1), BE&K's litigation should never have been found to have violated the Act.

Certainly, nothing in *Bill Johnson's* supports the result achieved by the NLRB and the Sixth Circuit. The Supreme Court's holding was fully consistent with the terms of Section 8(a)(1), finding only that an employer can commit an unfair labor practice when it improperly sues "employees." 461 U.S. 731, 740, 744.

The court of appeals' holding conflicts directly with another decision of the Sixth Circuit, *Johnson & Hardin Co. v. NLRB*, 49 F. 3d 237 (6th Cir. 1996). There the court

[2] It is worth reiterating that "labor organizations" are, by definition under the NLRA, decidedly ***not*** "employees." Compare 29 U.S.C. § 152(3)(definition of "employee") with 29 U.S.C. § 152(5)(definition of "labor organization").

followed the plain holding of *Lechmere* and stated that "Section 7 does not protect non-employee union organizers" (49 F. 3d at 240). The court of appeals further held:

> Here, the Board erred in finding that there "is no basis for distinguishing between employees and non-employee union representatives as recipients of reimbursement." *Bill Johnson's Restaurants* did not so hold and the Board has failed to support this finding.

Id. at 244. The Board committed the same error in the present case and deliberately ignored this Court's *Lechmere* holding in doing so. This time, however, the Sixth Circuit compounded the NLRB's error by enforcing the Board's decision.

The Sixth Circuit's decision also creates a conflict with the Ninth Circuit's decision in *Diamond Walnut Growers, Inc. v. NLRB*, 53 F. 3d 1085, 1087, 1089 (9th Cir. 1995). There, the court of appeals recognized the limited scope of Section 8(a)(1) under *Bill Johnson's,* in a case involving a suit against a union representing striking employees of the employer. The Ninth Circuit, unlike the Sixth Circuit, recognized that "not all suits against unions interfere with the employees' exercise of their Section 7 rights." The Ninth Circuit found against the employer only because Diamond "interfered with its employees' exercise of their Section 7 rights." Id. As the Court held, Diamond's lawsuit was actionable under the NLRA only because it "had an inevitable impact on the employees who were exercising their Section 7 right to strike." Id.

In deciding to expand the reach of *Bill Johnson's* and Section 8(a)(1) to suits against non-employee labor organizations, both the NLRB and the Sixth Circuit relied heavily, and erroneously, on this Court's holding in *Eastex, Inc. v. NLRB,* 437 U.S. 556, 564-5 (1978). In *Eastex,*

however, the Court held only that the term "employee" is not limited to the employees of a particular employer. (NLRB Br. at 22). Nothing in the *Eastex* holding extends the definition of "employee" to include labor organizations. Nor was the employer in *Eastex* found to have violated the rights of any employees but his own. All that the Supreme Court held in *Eastex* was that employees of an employer remained protected when they advocated the rights of other employees.

Again, the present case does not involve any adverse action taken by BE&K against ***any*** employees, either its own or anyone else's. BE&K sued a group of unions, not employees. Under such circumstances, no violation of Section 8(a)(1) should have been found. Certiorari should be granted to resolve a clear conflict caused by the Board's and court of appeals' drastic expansion of the scope of the NLRA.

III. The Writ Should Be Granted In Order To Resolve A Conflict Within The Circuits Regarding The Findings Necessary To Establish "Retaliatory Motivation" Under *Bill Johnson's*.

Under the second step analysis called for by the Supreme Court in *Bill Johnson's*, the NLRB was required to consider the reasonableness of BE&K's litigation in determining whether BE&K's motivation was "retaliatory." 461 U.S. at 749. The Sixth Circuit upheld the Board's finding of retaliatory motivation, without any hearing regarding the disputed question of intent, under an analysis directly conflicting with the Supreme Court's holding and decisions of numerous other circuits. *See Petrochem Insulation, Inc. v. NLRB*, 240 F. 3d 26 (D.C. Cir. 2001) (finding retaliation only because employer's complaint was "utterly frivolous"); *NLRB v. Local 520, IUOE*, 15 F.3d 677, 680 (7th Cir. 1994) (no retaliation found, despite lack of success in court); *NLRB v. Vanguard Tours, Inc.*, 981 F. 2d 62, 65 (2d Cir. 1992)

(withdrawn claims not retaliatory where reasonably based). For this reason as well, certiorari should be granted.

The Sixth Circuit compounded its error in the present case by relying on a *post hoc* rationalization for the Board's decision, not the Board's actual, stated rationale. The Board itself declared that it was entitled to find retaliation whenever a lawsuit "targets protected conduct" and seeks damages, and the suit has been found to "lack merit" (only in the sense of having not "prevailed"). (Id.). This standard for proving retaliatory motivation is guaranteed to result in an unfair labor practice finding by the Board, in any case where the employer has lost a lawsuit against a union who is deemed by the Board to have engaged in "protected" activity.

Recognizing the flaw in the NLRB's reasoning, the court of appeals attempted to bolster the Board's opinion by asserting as an *entirely new ground* for retaliatory motive the fact that BE&K filed its antitrust claim as an amendment to its original complaint, seeking treble damages. (App. 19a). The NLRB Decision never claimed that either the filing of the amendment, nor the seeking of treble damages, constituted grounds for a finding of retaliatory motive.

It is well settled that NLRB decisions must be reviewed on the facts and assertions set forth in the Board's opinion and not based upon *post hoc* rationalizations. *NLRB v. Yeshiva University*, 444 U.S. 672, 685, n.22 (1980). The courts of appeals have uniformly adhered to this requirement, until now. *See Speedrack Products Group, LTD. v. NLRB*, 114 F. 3d 1276, 1282 (D.C. Cir. 1997)("It is a basic principle of administrative law that a court can only affirm an agency on the basis of the same rationale relied on by the agency."); *accord, NLRB v. Alan Motor Lines, Inc.*,937 F. 2d 887, 892 (3d Cir. 1991); *NLRB v. Columbia University*, 541 F. 2d 922, 930 (2d Cir. 1976).

In addition, the new, *post hoc* theory on which the court of appeals rested its finding of retaliatory motive, i.e., the fact that BE&K requested treble damages under the antitrust laws, is directly contrary to the plain language of the Clayton Act, 15 U.S.C. 1. That law declares that a finding of treble damages is mandatory for violations of its provisions. The court's unsupported assertion that antitrust treble damages are analogous to punitive damages, which are discretionary and not mandated by statute, was clearly erroneous and conflicts directly with the holding of the Seventh Circuit in *NLRB v. International Union of Oper. Eng., Local 520*, 15 F. 3d 677, 679 (7th Cir. 1994). In *Local 502*, the Seventh Circuit held that it was improper to find retaliatory motive by reference to a request for punitive damages where such damages "are regularly asked for and awarded" under the state law on which a tort suit has been based.

The Sixth Circuit's reliance on BE&K's request for treble damages, which "are regularly asked for and awarded under the antitrust laws" creates another direct conflict in the law which must be resolved by this Court. The appeals court's unsupported theory, never adopted by the NLRB, cannot form the basis for the finding of retaliatory intent required by *Bill Johnson's*. This aspect of the Sixth Circuit's decision therefore further supports granting the writ of certiorari.

IV. The Writ Should Be Granted In Order To Resolve The Direct Conflict Between The Sixth And Ninth Circuits Regarding The Award Of Attorneys Fees As A Remedy In This Case.

As noted above, the Ninth Circuit expressly rejected a demand by the unions for attorneys fees at the conclusion of the USS-POSCO litigation. *See USS-POSCO*, supra, 31 F. 3d at 812. The Ninth Circuit's decision should have been given

res judicata effect by the NLRB and the Sixth Circuit.[3] However, both the NLRB and the Sixth Circuit ignored the Ninth Circuit's holding in themselves awarding attorneys fees in connection with the same lawsuit. (App. 22a, 62a). A direct conflict between the circuits therefore exists which must be resolved by this Court on certiorari.

The Sixth Circuit likewise ignored this Court's explicit holding in *Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners*, 456 U.S. 717 (1982), that attorneys fees should not be awarded to a prevailing party in litigation under Section 303 of the LMRA. As the Court explained: "[O]ne of the primary justifications for the American Rule is that one should not be penalized for merely defending or prosecuting a lawsuit....Even assuming that attorney's fees are necessary to achieve full compensation, this justification alone is not sufficient to create an exception to the American Rule in the absence of express Congressional authority...."

BE&K's complaint was originally filed under Section 303 and was clearly entitled to the protection afforded by the *Summit Valley* decision. *See also J.P. Stevens*, 268 NLRB 8 (1983)(supplemental decision on remand after *Summit Valley* was decided). In the *J.P. Stevens* case, the NLRB had initially awarded attorneys fees in connection with "flagrant employer misconduct" connected with prior litigation. After the *Summit Valley* decision, the *J.P. Stevens* case was remanded by the Fourth Circuit to the Board, which removed all attorneys fee requirements from the new remedial order.

The Sixth Circuit's failure to adhere to the mandate of *Summit Valley* will have a chilling effect on all employer

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[3] *See NLRB v. Donna-Lee Sportswear Co., Inc.*, 836 F. 2d 31, 33-34 (1st Cir. 1987); *NLRB v. Heyman*, 541 F. 2d 796 (9th Cir. 1976) (applying principles of res judicata to Board Orders).

efforts to enforce Sections 8(b)(4) and 303 of the Act, absent intervention by this Court through the granting of the writ.

Finally, the Sixth Circuit's award of attorneys fees to the unions in this case conflicts directly with the decision of the court in *Johnson & Hardin v. NLRB, supra*, 49 F. 3d at 245. In *Johnson & Hardin*, the court of appeals expressly rejected the "harsh remedy of attorneys fees" under Bill Johnson's, except where the employer's litigation has been found to be frivolous. The NLRB and the Sixth Circuit in the present case squarely disavowed the *Johnson & Hardin* approach, creating a direct conflict. The writ of certiorari should be granted so that this Court can resolve the question.

CONCLUSION

The decision of the Sixth Circuit presents direct conflicts with decisions of this Court and with numerous other appeals court decisions on issues of great importance to the business community. For each of the reasons stated above, the Court should grant the writ of certiorari.

Respectfully submitted,

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APPENDIX

1. BE&K Construction Co. v. NLRB,
246 F. 3d 619 (6th Cir. 2001).....1a

2. BE&K Construction Co. v. NLRB, No. 99-6469,
00-5012 (6thCir.), decision on rehearing en
banc.....26a

3. BE&K Construction Co.,
329 NLRB No. 68 (Sept. 30, 1999) 28a

4. Relevant Constitutional Provisions and Statutes
.....69a

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BE&K CONSTRUCTION COMPANY,

Petitioner/ Cross-Respondent, Nos.99-6469; 00-5012

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/ Cross-Petitioner,

STEAMFITTERS LOCAL 342, et al.,
Intervenors.

On Petition for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board.
Nos. 32-CA-9474; 32-CA-9475; 32-CA-12531-1-8.

Argued: February 1, 2001

Decided and Filed: April 9, 2001

Before: DAUGHTREY and GILMAN, Circuit Judges;
COLLIER, District Judge.

COUNSEL

ARGUED: Maurice Baskin, VENABLE, BAETJER, HOWARD & CIVILETTI, Washington, D.C., for Petitioner. Robert J. Englehart, NATIONAL LABOR RELATIONS BOARD, APPELLATE COURT BRANCH, Washington, D.C., for Respondent. Peter D. Nussbaum, ALTSHULER, BERZON, NUSSBAUM, RUBIN & DEMAIN, San Francisco, California, Sandra R. Benson, VAN BOURG, WEINBERG, ROGER & ROSENFELD, Oakland, California, for Intervenor. **ON BRIEF:** Maurice Baskin, VENABLE, BAETJER, HOWARD & CIVILETTI, Washington, D.C., for Petitioner. Aileen A. Armstrong, Anne Marie Lofaso, NATIONAL LABOR RELATIONS BOARD, APPELLATE COURT BRANCH, Washington, D.C., David Habenstreit, NATIONAL LABOR RELATIONS BOARD, OFFICE OF THE GENERAL COUNSEL, Washington, D.C., for Respondent. Peter D. Nussbaum, Meera Trepan, ALTSHULER, BERZON, NUSSBAUM, RUBIN & DEMAIN, San Francisco, California, Sandra R. Benson, VAN BOURG, WEINBERG, ROGER & ROSENFELD, Oakland, California, for Intervenor. Heather L. MacDougall, McGUINESS, NORRIS & WILLIAMS, Washington, D.C., for Amicus Curiae.

The Honorable Curbs L. Collier, United States District Judge for the Eastern District of Tennessee, sitting by designation.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. In the midst of a contentious labor dispute, the petitioner, BE&K Construction Company, filed suit in federal court in California against numerous labor organizations. The purpose of the lawsuit was to squelch certain concerted activity in which the unions were engaging on behalf of members who were on the BE&K construction site as employees of various sub-contractors and to ensure safe working conditions on the job-site. When the district court denied the requested relief, the unions filed complaints with the National Labor Relations Board, alleging that BE&K's court filings constituted an unfair labor practice. Based on the Supreme Court's ruling in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731(1983), the Board agreed with the unions and ordered the petitioner to cease and desist from its illegal activities and, additionally, ordered the company to reimburse the unions for their attorneys' fees and costs. From that decision, the petitioner seeks review, contending (1) that the opinion in *Bill Johnson's* does not apply to non-employee unions; (2) that the district court suit in California did not constitute an unfair labor practice because it did not completely lack a reasonable basis; (3) that there was not substantial evidence to support the Board's ruling that the California litigation was retaliatory; and (4) that the Board was not justified in awarding costs and fees against the petitioner. Also before this court is the Board's related petition for enforcement of its order. For the reasons detailed in this opinion, we conclude that BE&K's petition for review should be denied and the Board's petition for enforcement granted.

FACTUAL AND PROCEDURAL BACKGROUND

In late *1986* or early *1987*, BE&K, an industrial general contractor operating throughout the United States, contracted with USS-POSCO Industries, Inc., to modernize a steel mill in Pittsburg, California. BE&K then formed a joint venture with Eichleay Constructors, Inc., to perform the contract work. According to BE&K, various union groups objected to the BE&K agreement with USS-POSCO because BE&K maintained no collective bargaining relationship or agreement with the unions. BE&K contends that in retaliation for USSPOSCO awarding the modernization contract to a non-union contractor, the unions engaged in various activities to delay the project. Specifically, BE&K maintains that the unions: advocated the adoption and enforcement of a toxic waste emission standard for the construction project, even though the labor groups had no genuine concern that the modernization of the steel mill would be environmentally harmful; picketed and hand-billed at BE&K's premises without disclosing the nature of their disagreement with the company and encouraged employees of subcontractors to engage in a strike at the project; filed a civil action in California state court, *Pileabriers, Divers, Bridge Wharf & Dock Builders Union Local 34, AFL-CIO, et al. v USSPOSCO Indus., Inc., et al.*, alleging, among other things, violations of California's Health and Safety Code in an effort to delay the modernization project and increase costs; and initiated contract grievances against Eichleay Constructors, BE&K's joint venturer, under collective bargaining agreements that did not apply to Eichleay.

In response to what BE&K pejoratively terms the unions' "corporate campaign," USS-POSCO and BE&K filed suit in district court in California against numerous labor organizations pursuant to § 303 of the National Labor

Relations Act, *29 U.S.C. § 187,* seeking damages for the allegedly unfair tactics. The union defendants filed motions for summary judgment with the court, arguing that "the activities challenged in the first and third claims (legislative lobbying and filing lawsuits, respectively) are protected by the First Amendment," and that "because contractual grievance and arbitration proceedings are the preferred method of resolving labor disputes under federal labor policy," the fourth claim regarding initiation of grievance proceedings cannot result in tabor law liability. *See USS-POSCO Indus. v Contra Costa County Bldg & Constr. Trades Council, AFL-CIO, 692* F. Supp. *1166, 1168* (N.D. Cal. *1988).*

Relying upon the rationale adopted by the United States Supreme Court in *Bill Johnson's Restaurants, Inc. v NLRB, 461 U.S. 731 (1983),* the district court granted summary judgment to the union defendants on the companies' legislative lobbying claim (Claim 1). As noted by the district court:

> The lobbying of state and local legislative bodies implicates the same First Amendment and federalism concerns at issue in *Bill Johnson's Restaurants*. The right to petition a legislative body falls squarely under the "umbrella of `political expression'." As for federalism concerns, this Court will not lightly infer a Congressional intent to "ignore the substantial state interest in protecting the health and well-being of its citizens." Such an interest is clearly at stake when a toxic waste law is under consideration by a local legislative body.

USS-POSCO Indus., 692 F. Supp. at *1169-70* (citations omitted).

Summary judgment was also granted to the defendants on Claim (initiating collective bargaining grievances). In so ruling, the district court relied upon the fact that even USS-POSCO's and BE&K's own exhibits indicated that the

challenged grievances had been successful and, "[a]s **with** well-founded state lawsuits, successful grievances to enforce lawful provisions of a collective bargaining agreement cannot constitute unfair labor practices . . . ." Id. at *1170.*

Finally, summary judgment was denied, without prejudice, on the claim that the unions improperly filed a state court action against the companies. In making that ruling, the district judge noted that, while the right of access to the courts is a protected First Amendment right, a baseless state suit receives no such protection. The court thus allowed the parties additional time for discovery in order to ascertain whether the unions' state court lawsuit was indeed baseless. *See id.* at 1170.

Subsequently, after the dismissal of two of USS-POSCO's and BE&K's claims against the defendant unions, USS-**POSCO and BE&K** filed an amended complaint that not only included some claims similar to those upon which the court had previously granted summary judgment, but also a claim that alleged, for the first time, violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. In response to dispositive motions filed by the union defendants, the district court dismissed the amended complaint as "unacceptable because the first cause of action includes a restatement of several of the claims upon which summary judgment for defendants has already been granted by the Court." The court **did grant USS-POSCO and BE&K** leave to revise the amended complaint, however, so as to bring the filing in line with existing court rulings.

In that same order, the district court also dismissed USS-POSCO's and BE&K's unfair labor practice claim that was based upon the unions' prosecution of a state court action seeking redress for alleged safety violations at company sites. First, the court dismissed that part of the claim that

sought imposition of liability upon two union locals, Steamfitters Local 342, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, and Local 302 of the International Brotherhood of Electrical Workers, AFL-CIO, because those organizations were not parties to the state court litigation. Second, the court dismissed the claim against the remaining union defendants who had been parties to the state action because the federal court concluded that the companies failed to demonstrate that the state claims had been without a reasonable basis in law. In fact, although noting that the unions had failed in the state proceeding to obtain either a temporary restraining order or a preliminary injunction against the companies, the district court recognized that, as a result of the court filing by the unions, federal investigators from the Occupational Safety and Health Administration found "numerous health and safety violations" at the job-site. Consequently, the companies were unable to cite to any evidence "which could support a finding that no reasonable legal and factual basis existed for the filing of the state court action."

Eventually, USS-POSCO and BE&K filed a second amended complaint with the district court. In that document, the companies reasserted many of the same claims they had previously advanced, specifically the allegations of antitrust violations; improper picketing, lobbying, and hand-billing; and improper filing of grievances and court actions. The district court dismissed the complaint insofar as it raised allegations already addressed in prior rulings. Further, because USS-POSCO and BE&K continued to raise such issues, the court imposed sanctions upon the plaintiffs pursuant to Rule 11 of the Federal Rules of Civil Procedure. USS-POSCO then dismissed, with prejudice, its other claims against the unions; as a result, the remaining issues

went forward through the discovery process with only BE&K as a party plaintiff.

By court order, however, the district court limited the scope of BE&K's discovery requests. Because the court concluded that the company, in order to succeed on its antitrust claims, must prove both that the unions improperly combined with non-labor groups *and* that the combination had occurred for an illegitimate purpose, the district judge first ordered that discovery be limited to the issue of whether BE&K could establish that the unions actually combined with non-labor entities. *See USS-POSCO Indus. v. Contra Costa CountyBldg. & Constr. Trades Council, AFL-CIO,* 31 F.3d 800, 804 (9th Cir. 1994). Because the company could not adduce any evidence in support of that prong of the court-defined analysis, the district judge granted the unions' motion for summary judgment on the antitrust cause of action. At that point in the proceedings, BE&K voluntarily dismissed the remaining allegations of labor law violations, which asserted that the unions had illegally fomented violence against the company. Following entry of final judgment, BE&K appealed to the United States Court of Appeals for the Ninth Circuit, contending that the district court had erred in its explication of antitrust law and in its imposition of sanctions pursuant to Rule 11.

The Ninth Circuit agreed with BE&K that the district court erred in concluding that an adversary must establish both that a union combined with a non-labor group and that the union did not act in its legitimate self-interest before the labor organization's statutory exemption from antitrust liability could be circumvented. Nevertheless, the court found that any error in the district court's analysis was harmless because application of the *Noerr-Pennington* doctrine also provided **antitrust** immunity to the unions while lobbying government officials or while petitioning administrative agencies or courts, unless Ihe party was

engaged in "sham" petitioning. *See id.* at 810.[1] Despite BE&K's arguments to the contrary, the court refused to conclude that the unions' lawsuits were frivolous and brought without regard to the merits. As noted in the court's opinion:

> Here .... fifteen of the twenty-nine lawsuits alleged by BE&K as part of the pattern of filings "without regard to the merits" have proven successful. The fact that more than half of all the actions as to which we know the results turn out to have merit cannot be reconciled with the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success.

Id. at 811 (footnote omitted). Consequently, the court affirmed the district court's dismissal of the antitrust claims against the unions; however, the appellate tribunal also reversed the lower court's award of Rule 11 sanctions on the ground that the company re-pleaded previously-dismissed claims in its amended complaint only out of a legitimate, although incorrect, belief that such re-allegation was necessary to preserve the issues for future appeal. Id. at 811-12.

During the pendency of these various court proceedings, the NLRB had held in abeyance unfair labor practice complaints originally lodged by two union locals (and joined by numerous other labor organizations) shortly after **USS-POSCO** and BE&K filed suit against them in California district court. With the conclusion of that litigation, the NLRB reasserted jurisdiction over the administrative complaints and determined that the companies had indeed attempted to retaliate against the unions and their members

[1] *Noerr-Pennington* immunity principles are derived from the holdings of the United States Supreme Court in *Eastern Railroad Presidents Conference v. NoerrMotor Freight, Inc., 365 U.S. 127 (1961),* and *United Mine Workers v. Pennington, 381 U.S. 657 (1965).*

for engaging in activities protected by federal labor legislation by filing the meritless lawsuit. The Board thus ordered BE&K to cease and desist from such illegal actions and directed the company to pay the legal fees and expenses incurred by the union defendants in the USS-POSCO litigation. From that Board decision, BE&K now petitions to this court for review. The Board has also availed itself of the jurisdiction of this court, seeking enforcement of the Board's order.

DISCUSSION

1. Ability of Non-Employee Union to Seek Relief Under Federal Labor Law

Pursuant to the provisions of § 7 of the National Labor RelationsAct:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . . .

29 U.S.C. § 157. Moreover, § 8(a)(1) of that same act, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce *employees* in the exercise of the rights guaranteed in section 157 . . . ." (Emphasis added.)

The Board concluded in this case that BE&K's filing of a federal court action against the union defendants amounted to

just such an unfair labor practice under § 8(a)(1) of the Act. BE&K, of course, disagrees and first asserts that it is **interference** only with employees, and not with unions, that is prohibited by the Act. Both the company and the unions do agree, however, that the starting point for any analysis of this issue is the seminal decision of the United States Supreme Court in *Bill Johnson's.*

In that case, the Court noted potential First Amendment implications if the Board sanctioned an employer for exercising its right to petition the courts for a redress of grievances. *See Bill Johnson's,* 461 U.S. at 741. Where the lawsuit initiated by the employer lacks a reasonable basis in fact or law, however, and where the action was filed to retaliate against the employee or employees for engaging in activity protected by federal labor legislation, the First Amendment concerns are ameliorated and the Board may actually enjoin the prosecution of the case. The Court went on to hold that, in situations in which the employer has already availed itself of the protections of the court system and a judgment adverse to the plaintiff has been rendered, there is no need to meet the heightened burden required to be satisfied when an employee seeks to enjoin an ongoing judicial proceeding. In fact, the governmental interest in ensuring a forum for redress of wrongs has been fulfilled in such instances and Board action is justified upon a showing only of an unmeritorious, rather than "baseless," lawsuit filed for a retaliatory purpose. *See id.* at 749.

Indisputably, the explicit language of *Bill Johnson's* refers only to the potential improprieties of employer-initiated lawsuits filed against *employees* engaged in protected activities. However, *Bill Johnson's* language regarding such suits was restricted to those circumstances, and not to suits filed against *unions,* simply because the Court appropriately

addressed only the case then before it. *See Geske & Sons, Inc. v. NLRB,* 103 F.3d 1366, 1377 (7th Cir. 1997).

Nevertheless, BE&K contends that subsequent Supreme Court pronouncements took that next analytical step that was not appropriate in *Bill Johnson's.* Specifically, the company notes that the Court's decision in *Lechmere, Inc. v. NLRB,* 502 U.S. 527, 532 (1992), explained that, "[b]y its plain terms .... the NLRA confers rights only on *employees,* not on unions or their nonemployee organizers." Again, however, an understanding of the nature of the dispute that precipitated the *Lechmere* decision places the Court's seemingly all-inclusive statement in a more restrictive context. In *Lechmere,* the Supreme Court was asked to resolve a dispute concerning the asserted rights of an organizing union to enter upon prorate property to distribute handbills to company employees to whom the union had alternative means of access. Although ruling that unions had no right under the Act to trespass upon private property *under the circumstances presented in that case,* the Court also recognized that § 7 of the Act, by necessary implication, extended some legislative protection to unions.[2] Citing its earlier decision in *NLRB v. Babcock &* Wilcox Co., 351 U.S.

[2] Similarly, the Sixth Circuit decision in *Johnson & Hardin Co. v. NLRB,* 49 F.3d 237 (6th Cir. 1995), upon which BE&K also relies, involved only a situation in which nonemployee union members trespassed onto private property in order to distribute handbills to Johnson & Hardin employees. As a result, that case also stands for the proposition that nonemployee organizers may enter onto private property only under extremely limited circumstances. The case does not, however, stand for the broader legal principle that unions have no § 7 rights whatsoever. *See also Cleveland Real Estate Partners v. NLRB,* 95 F.3d 457, 463 (6th Cir. 1996) (recognizing that "there is a substantial difference between the rights of employees and of nonemployees with respect to the distribution of union literature on privately owned property), *overruled on other grounds in NLRB v. Webcor Packaging, Inc., 118* F.3d 1115, 1119 (6th Cir. 1997).

105, 113 (1956), the Court stated "that insofar as the employees' `right of self-organization depends in some measure on [their] ability . . . to learn the advantages of self-organization from others,' § 7 of the NLRA may, in certain limited circumstances, restrict an employer's right to exclude nonemployee union organizers from his property." *Lechmere,* 502 U.S. at 532.

BE&K insists that the "core" right of self-organization is not implicated in this matter and that the non-employee union defendants are thus not entitled to the protections of § 7. Without question, courts have constructed a hierarchy of labor rights, at the highest levels of which is the effort by employees to organize for their collective good. Furthermore, because of the importance of that concerted activity, courts have accorded to organizing unions a "derivative right" to engage in such actions. *See NLRB v. Great Scot, Inc.,* 39 F.3d 678, 682 (6th Cir. 1994). In fact, as the Seventh Circuit has explained, "[i]t would be anomalous to hold that an employer may not interfere with its employees' right to organize by filing baseless lawsuits against them, but that it may achieve the same result by filing a baseless lawsuit against a union **attempting** to organize the em loyees." *Geske,* 103 F.3d at 1377.

Alhough the activities in which the union defendants in the USS-POSCO litigation engaged did not involve overt attempts at organization, some accommodation of those actions by an employer may still be required under applicable labor law. *See, e.g., O'Neil's Markets v. United Food and Commercial Workers' Union, Meatcutters Local 88, 95* F.3d 733, 737 (8th Cir. *1996)* ("although area standards hand-billers are not engaging in `core' organizing activities and therefore may deserve fewer accommodations, private property owners may, under certain circumstances, be obligated to accommodate them"). Indeed, such an obligation

may be imposed even though the members of the union are not even employees of the targeted company.

The term "employee," as used in the National Labor Relations Act, is accorded a broad meaning indeed. Pursuant to the express provisions of *29 U.S.C. § 152(3),* the term "employee" (who may, under § 7 of the Act, engage in activities for "mutual aid and protection") "shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise." The Supreme Court, in *Eastex, Inc. v. NLRB, 437 U.S. 556, 564* (1978), has explained that "[t]his definition was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own." Moreover, the statutorilyprotected "employees" may seek improvement of employment terms and conditions through channels outside the immediate employer-employee relationship, including resort to administrative and judicial forums and to legislative appeals. *See id.* at *565-66.* Otherwise, as explained in *Eastex:*

> To hold that activity of this nature is entirely unprotected - irrespective of location or the means employed - would leave employees open to retaliation for much legitimate activity that could improve their lot as employees. As this could "frustrate the policy of the Act to protect the right of workers to act together to better their working conditions," we do not think that Congress could haveintended the protection of § 7 to be as narrow as petitioner insists.
>
> Id. at *566-67* (citation omitted).

In this case, the lobbying and petitioning in which the unions participated was intended to protect the health of BE&K employees and improve safety conditions at company worksites, as well as to vindicate the rights of

sub-contractor employees. Attainment by the unions of even site-specific improvements or promises of diligent enforcement of existing health and safety standards, moreover, clearly establishes helpful precedent for future labor actions and serves to improve, through concerted action, the lot of all working women and men in similar situations. As such, the work of the unions in this case is not so attenuated from the interests of BE&K employees that the "activity cannot fairly be deemed to come within the `mutual aid or protection' clause" *of § 7. Id.* at *568.* Consequently, the Board decision to apply *Bill Johnson's* principles to the *unions'* activities in this case is proper. As held by the Board in this matter:

It would be a curious and myopic reading *of* these core provisions of the Act [(§ *7's* provision of the right to self-organization and of the right to engage in concerted activity for mutual aid or protection)] to hold that, although employees are free to join unions and to work through unions for purposes of "other mutual aid and protection," the conduct of the unions they form and join for those purposes is not protected by the Act. Under that reasoning, conduct that is protected when engaged in by two or more employees together would lose its protection if engaged in by the employees' union on their behalf.

We note further that, in the week prior to oral argument in this matter, the United States Court of Appeals for the District of Columbia filed its decision in *Petrochem Insulation, Inc. v. NLRB, 240* F.3d *26 (D.C.* Cir. *2001),* a case raising many of the same issues presented here and even citing the Board's decision in the claims against BE&K. In *Petnochem Insulation,* the D.C. Circuit also concluded that unions, as well as employees, are entitled to the protections afforded by § 7 and the principles enunciated in *Bill*

Johnson's. Today, we thus join our sister circuit in that interpretation of federal labor law.

II. Bill Johnson's Liability

A. "Unmeritorious" v. "Lack of Reasonable Basis"

BE&K next contends that even if unions may assert derivative § 7 rights, the Board's decision that the company committed an unfair labor practice by filing suit against the unions in federal court in California is incorrect. According to BE&K, before it may be punished administratively for availing itself of the judicial process, the Board must determine that the company's suit completely lacked a reasonable basis. The explicit language of controlling Supreme Court precedent does not, however, impose such a burden upon the administrative agency.

In *Bill Johnson's,* the Supreme Court recognized that "[a] lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation" because "[r]egardless of how unmeritorious the employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it." Bill *Johnson's, 461 U.S.* at 740-41. Furthermore, "the chilling effect of a . . . lawsuit upon an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief." Id. at 741. Nevertheless, the employer's right of access to the courts remains an aspect "of the First Amendment right to petition the Government for redress of grievances." Id.

In balancing those countervailing interests, the Court distilled certain principles that are of assistance in addressing BE&K's allegations of error in this case. First, "[t]hefiling and prosecution of a well-founded lawsuit may

not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act." Id. at 743. Second, the Board may enjoin "the prosecution of an improperly motivated suit lacking a reasonable basis." Id. at 744. Finally, and most important for purposes of this litigation:

In instances where the Board must allow the lawsuit to proceed, if the employer's case in the state court ultimately proves meritorious and he has judgment against the employees, the employer should also prevail before the Board, for the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice. If judgment goes against the employer in the state court, however, or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day-in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the § 8(a)(1) and § 8(a)(4) unfair labor practice case. The employer's suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' § 7 rights. If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses._

Id at 747.

Despite BE&K's attempts to draw fine distinctions from Bill Johnson's, the Board appropriately concluded in this matter that the federal district court in California had already determined that the company's claims against the unions were all either without merit or voluntarily dismissed. Because the Board's general counsel was not, therefore,

attempting to *enjoin* a parallel proceeding, there was no need for the Board to establish that BE&K's allegations were without a reasonable basis in fact or law. Instead, because the judicial branch of government had already determined that BE&K's claims against the unions were unmeritorious or dismissed, evidence of a simple retaliatory motive. would suffice to adjudge the company guilty of committing an unfair labor practice. The mere failure of company to prevail on its claims against the union in regular judicial proceedings was sufficient to strip BE&K of some of its First Amendment protection because of the company's prior opportunity to avail itself of a judicial forum for redress of its grievances. *See also Johnson & Hardin,* 49 F.3d at 243 ("if the employer does not prevail - the state court judgment is adverse or the suit is withdrawn or otherwise shown to be without merit - the Board may then decide whether the suit was filed with a retaliatory motive"); *NLRB v. Vanguard Tours, Inc.,* 981 F.2d 62, 65 (2d Cir. 1992) (once the employer has lost court action on the merits "-- even if he had a reasonable basis in bringing **suit -- the Board** may consider4he filing of the suit to have been an unfair labor practice").[3]

BE&K directs this court to the Supreme Court decision in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.,* 508 U.S. 49 (1993), in support of its contention that the Court's most recent pronouncements indicate that only baseless or "sham" suits serve to restrict the

[3] In Vanguard Tours, the Second Circuit did rule that withdrawal of a suit, as opposed to a decision on the merits, should call for the higher standard of lack of a reasonable basis in fact or law before finding an unfair labor practice for filing suit in retaliation for exercise of § 7 rights. *See 981* F.2d at 66. That case, however, did not address the situation in which the majority of a plaintiff's cause of action is dismissed *on the* merits and only a portion is voluntarily withdrawn. Furthermore, the court recognized that the applicable language from Bill *Johnson's* could be read for the proposition "that withdrawal of the suit is equivalent to a judgment against the employer." td.

otherwise unfettered right to seek court resolution of differences. That decision, however, involved only a claim of *Noerr-Pennington* immunity from *antitrust* liability.

Moreover, in analogizing the situation presented in that case to the principles discussed in *Bill Johnson's,* the Court referred solely to labor law situations in which attempts were made *to enjoin* employer-initiated litigation, not situations in which court rulings had already been rendered. Id. at *59.* Thus, the principles BE&K seeks to extract from *Professional Real Estate Investors* are totally inapplicable to the circumstances presently before us in this case. *See Petrochem Insulation, 240* F.3d at 31-2.

The law as interpreted by the Supreme Court in *Bill Johnson's* and by this circuit in *Johnson & Hardin* creates a bifurcated system of analysis in determining the protections to be afforded an employer for filing retaliatory lawsuits against employees and unions. Prior to a court ruling on the merits of the employer's suit, the Board will not find an unfair labor practice unless the underlying lawsuit was without reasonable basis. Following a court determination that the employer's claims are without merit, however, there is no longer a need to prevent interference with the First Amendment right to seek judicial redress. At that point, the Board is justified in examining the motives of the employer to determine whether the company unfairly dragged the workers or their representatives into court to further illegal objectives.

In this case, the California district court ruled *on the merits* that BE&K could not succeed on its claims against the unions. Such a finding of an unmeritorious court action is thus sufficient to justify a subsequent investigation by the Board into the motives of the company in filing its lawsuit.

B. Retaliatory Motive

In arguing that the Board erred in **finding that BE&K filed** its suit against the unions with a retaliatory motive, the company contends that the Board inferred the requisite retaliation merely from the fact that BE&K failed on the merits of its underlying cause of action. While the Board did, in fact, mention the lack of merit of BE&K's lawsuit as *one consideration* in its determination of retaliatory motive, that factor was far from the only evidence in support of the Board's finding. Indeed, if it were, the Board would run the serious risk of conflating the two elements of the *Bill Johnson's* unfair labor practice analysis and thus infringe upon the protections afforded by the petition clause of the First Amendment. Instead, the record now before us contains substantial evidence, albeit circumstantial, from which the Board could reasonably infer a retaliatory motive in BE&K's decision to file suit against the defendant unions in California district court. *See Geske & Sons,* 103 F.3d at 1375 ("[m]otive or intent almost always must be inferred from circumstantial evidence").

First, the United States Supreme Court itself, in *Bill Johnson's,* admitted that the mere finding that an employer's suit against employees (or unions) is unmeritorious warrants the Board "taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' § 7 rights." Bill *Johnson's, 461 U.S.* at 747. Such a judicial finding was indeed made in this instance.

Second, after much of BE&K's original suit had been dismissed by a summary judgment ruling in favor of the defendant unions, the company filed amended complaints that not only re-alleged many of the same claims upon which the district court had already ruled, but also sought

treble damages from the defendants for alleged antitrust violations in banding together for protected § 7 activities. As determined by the Ninth Circuit in *Diamond Walnut Growers, Inc. v. NLRB,* 53 F.3d 1085, 1089 (9th Cir. 1995), the simple request for such punitive damages is another factor to be considered in evaluating an employer's motive in prosecuting its lawsuit.

Finally, an additional inference of retaliatory motive may be made from the fact that BE&K sought recompense from two union organizations for a previous lawsuit filed by other union officials, even though the two union locals admittedly were not parties to the precedent legal action (the *Piledrivers* suit). Even after labor attorneys called this information to BE&K's attention, moreover, the company refused to dismiss the two locals, despite BE&K's failure to uncover, after extensive discovery, any evidence of participation by those parties in the prior litigation. In response, BE&K argues that the continued prosecution of the civil action against the two locals resulted only from the business's belief that all the local unions, even those that were not parties, were "jointly responsible for a jointly devised and executed series of sham proceedings." The very disingenuousness portrayed by such an argument lends additional support to the conclusion that BE&K harbored a deep, anti-union bias that led it to retaliate against the organized labor movement for engaging in governmental petitioning and judicial proceedings protected by the federal constitution and by federal labor legislation.

The plain language of the National Labor Relations Act directs that "[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(e). Because substantial evidence in the record convincingly indicates that BE&K did indeed possess an

improper, illegal, retaliatory motivation in prosecuting its suit against the union defendants, this court is duty-bound to accept that determination.

III. Propriety Of Award Of Attorneys' Fees

Having found that the defendant unions can indeed assert § 7 rights in a situation such as that presented here, and having determined that BE&K committed an unfair labor practice by filing a meritless suit against the unions with a retaliatory motivation, we must still determine whether the Board was within its power in awarding attorneys' fees to the unions to compensate them for defending against BE&K's filings. The plain language of the National Labor Relations Act and of the Supreme Court's *Bill Johnson's* decision, as well as the underlying purposes of national labor legislation, demand an affirmative response.

BE&K relies upon *dicta* in the Sixth Circuit's decision in *Johnson & Hardin* for the proposition that "the harsh remedy of a grant of attorneys' fees" should be invoked only to "discourage future frivolous litigation." *Johnson & Hardin,* 49 F.3d at 244. Such dicta, however, was discussed in a situation in which the employer was found *not* to have committed a *Bill Johnson's* unfair labor practice. Any discussion of the propriety of an attorneys' fee award in that case was thus without force or effect in future decisions. Moreover, the authorities cited by this court in *Johnson & Hardin* for the proposition now espoused by BE&K were decisions pre-dating the Supreme Court's *Bill Johnson's* ruling.

By contrast, in Bill *Johnson's* itself, the Court specifically, and without further qualification, stated that, "if *a violation [of § 7 rights in a scenario like that presented in this appeal] is found,* the Board may order the employer to reimburse the

[parties] whom he had wrongfully sued for their attorney's fees and other expenses. It may also order any other proper relief that would effectuate the policies of the Act." *Bill Johnson's, 461* U.S. at *747* (emphasis added).[4] Moreover, the Court had previously explained:

> The Board's power [to fashion remedies under 29 U.S.C. § 160(c)] is a broad discretionary one, subject to limited judicial review. The relation of remedy to policy is peculiarly a matter for administrative competence. In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience. The Board's order will not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.

Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 216 (1964) (citations and internal punctuation omitted). *See also Geske & Sons,* 103 F.3d at 1378.

In light of the indisputable rulings in these two Supreme Court decisions, if we were to refuse to enforce the Board's order that BE&K reimburse the unions for their attorneys' fees, we would be crossing the line demarcating not only the division of functions ~~of~~ the judicial and executive branches of government, but also the line dividing judicial and legislative areas of authority. The Board's order in this matter could

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[4] In fact, 29 U.S.C. § 160(c) plainly instructs:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as *will effectuate the policies of this subchapter .... (emphasis added).*

never be construed as "a patent attempt" to frustrate the policies of the Act. In fact, the award of attorneys' fees is nothing more than an effort to correct the effects of BE&K's unfair labor practice by returning the injured parties, at least in part, to the financial positions they occupied prior to the filing of the company's unmerited, retaliatory suit. Moreover, the award replenishing union coffers serves the laudable goal of benefitting a broad range of laborers whose dues dollars initially financed the defense of the federal court action and who stand to benefit from the unions' attempts to enforce health, safety, and zoning regulations.

Furthermore, adherence to the policy advocated by BE&K to reserve attorneys' fee awards to those cases in which the non-prevailing party pursued a frivolous, as opposed to a merely unmeritorious, action evidences a basic misunderstanding of the purpose of the attorneys' fee award in this instance. As stated by the Board in its ruling:

> We do not award attorneys' fees in Bill *Johnson's* cases because employers' suits are *frivolous.* We award them because the suits are *unlawful;* they themselves constitute the unfair labor practices for which a remedy must be provided. As the court of appeals correctly observed in *Geske & Sons,* the Unions would not have incurred those attorneys' fees except for the Respondent's meritless lawsuit, and it is both appropriate and necessary to order that they be made whole and to provide an economic disincentive for engaging in similar unlawful conduct.

BE&K Constr. Co., 329 NLRB No. 68 at *12* (Sept. *30, 1999).*

Our review of remedial action ordered by the Board is extremely limited. Because the award of attorneys' fees to the unions in this matter upon the finding of an unfair labor practice is inherently consistent with the underlying purposes

of the National Labor Relations Act, any attempt to undo the administrative sanction would unnecessarily intrude upon the province of a co-equal branch of government acting within constitutional parameters.

CONCLUSION

In this case, BE&K admits that it filed a federal court action against the union defendants in an effort to coerce the unions to cease their administrative and judicial petitioning for strengthened working standards and for stricter enforcement of health and safety requirements. Because the unions, acting on behalf of affected workers, were engaged in activities protected alternatively by the federal labor laws or by the First Amendment's right to seek redress of grievances, the Board properly determined that BE&K's effort to subvert those plans constituted an unfair labor practice. Moreover, to effectuate the policies of the National Labor Relations Act and to return the unions to the position in which they would have been without having to defend the unlawful lawsuit, the Board acted within its broad powers to order BE&K to reimburse the unions for their costs and attorneys' fees. Consequently, we must DENY BE&K's petition for review of the Board decision and GRANT the Board's request for enforcement of that ruling.

99-6469/00-5012

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BE & K CONSTRUCTION COMPANY, Petitioner/Cross-Respondent, v. NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner. STEAMFITTERS LOCAL 342, ET AL., Intervenors.	ORDER

BEFORE: DAUGHTREY and GILMAN, Circuit Judges; and COLLIER,* District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

*Hon. Curtis L. Collier, United States District Judge for the Eastern District of Tennessee, sitting by designation.

DECISION OF THE NATIONAL LABOR RELATIONS BOARD

BE & K CONSTRUCTION CO.

329 NLRB No. 68

BE & K Construction Company and Steamfitters Local 342, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO and Local 302, International Brotherhood of Electrical Workers, AFL-CIO and District Council of Iron Workers of the State of California and Vicinity, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Contra Costa County Building And Construction Trades Council, AFL-CIO and Northern California District Council Of Laborers, Laborers International Union Of North America, AFL-CIO and Bay Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO and Local Union No. 378, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Cement Masons Union Local No. 825, Operative Plasterers and Cement Masons International Association, AFL-CIO and Local No. 549, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO. Cases 32-CA-9474, 32-CA-9475 and 32-CA-12531-1-8

September 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On October 18, 1995, the General Counsel of the National Labor Relations Board issued a consolidated complaint alleging that the Respondent had violated Section 8(a)(1) of the Act. The Respondent filed an answer admitting in part and denying in part the complaint allegations and raising certain affirmative defenses.

On March 13, 1996, the General Counsel filed a Motion for Summary Judgment and memorandum in support, with exhibits attached. The General Counsel submits that the Respondent's answer raises no material issues of fact requiring a hearing. On March 18, 1996, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the motion should not be granted.[5] The Respondent filed an opposition to the motion and a cross-motion for summary judgment in its favor. The General Counsel filed a reply brief, the Charging Parties filed briefs in support of the General Counsel and in opposition to the Respondent, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motions for Summary Judgment

The principal issue in this case is whether the Respondent violated Section 8(a)(1) by filing and maintaining a civil lawsuit against the Charging Party Unions in Federal district court. The General Counsel and the Unions contend that the Respondent's suit lacked merit because, except for certain claims that the court dismissed with prejudice at the Respondent's request, the court granted the Unions' motions for summary judgment in their favor. The General Counsel and the Unions further argue that the Respondent sued the Unions in retaliation for their having engaged in activities protected by Section 7 of the Act. Because the suit lacked

[5] On March 21, 1996, the Board issued an amended order.

merit and was filed for retaliatory purposes, the General Counsel and the Unions urge that, under Bill Johnson's Restaurants v. NLRB,[6] the Board should find that it was unlawfully filed and maintained, and should require the Respondent to reimburse the Unions for attorneys' fees incurred as a result of the suit. The General Counsel and the Unions also dispute the Respondent's contention that certain allegations of the complaint are untimely.

The Respondent contends that its suit was lawful because, in its view, (1) the Unions' actions that were the subject of the suit were not protected by Section 7; (2) it prevailed in certain respects in the district court litigation; (3) the suit had a reasonable basis in fact and law; and (4) the suit was not filed with retaliatory intent. The Respondent also argues that some of the allegations of the complaint are time-barred by Section 10(b). Finally, the Respondent contends that even if it violated the Act, the Board should not require it to pay the Unions' attorneys' fees.

On the basis of the record presented, we find that there is no genuine issue as to any material fact and that the General Counsel is entitled to judgment as a matter of law. Thus, for the reasons discussed below, we agree with the General Counsel and the Unions that the Respondent's suit was unmeritorious and that it was filed in retaliation against the Unions' protected activities. We also reject the Respondent's contention that some of the complaint allegations are time barred. We therefore find that the Respondent's suit violated Section 8(a)(1) as alleged. We also find it appropriate to order the Respondent to make the Unions whole by reimbursing them for the attorneys' fees they incurred in defending against the suit. In sum, we shall grant the General Counsel's motion for summary judgment and deny the Respondent's motion.

[6] 461 U.S. 731 (1983).

On the entire record, the Board makes the following

FINDINGS OF FACT

For the purposes of deciding the issues raised in the Motions for Summary Judgment, the factual record in this case comprises the admitted allegations of the complaint, other admissions made by the parties, and the facts actually found by the courts.[7] We make this statement because the Respondent asserts that a number of the allegations contained in its various claims were accepted as true by the courts and must be treated as facts by the Board. With that assertion we emphatically disagree.

There is no dispute that the Unions did, in fact, engage in some of the conduct-filing a state court lawsuit, instituting grievance and arbitration proceedings, and engaging in certain lobbying activities-that the Respondent argued was unlawful. The courts found those actions not to be unlawful, even if, as the Respondent contends, they were undertaken with a secondary objective. Other actions alleged to be unlawful were the subject of claims that the Respondent withdrew with prejudice; the court made no factual determinations regarding them. The Respondent nevertheless argues that the record in the court proceedings establishes that all of its factual allegations are true, including its allegations of an unlawful secondary objective.

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[7] We shall also consider the affidavits and declarations attached to the parties' briefs. It is well settled that, in ruling on a motion for summary judgment, we are required to construe the facts in the light most favorable to the nonmoving party. Therefore, when ruling on the General Counsel's motion, we shall assume the facts as represented by the Respondent are true unless they have been determined to be otherwise by the courts. In ruling on the Respondent's motion, we shall give like treatment to the facts as represented by the General Counsel and the Unions.

There is no merit to that contention. The courts, in granting the Unions' motions for partial summary judgment, were required to view the record in the light most favorable to the Respondent as the nonmoving party.[8] In finding that the Unions were entitled to judgment as a matter of law, the courts had to assume the facts were as the Respondent alleged, not to find them so. It is plain from their decisions that the courts considered the Respondent's allegations and found that those allegations, even if true, would not support a conclusion that the Unions had acted unlawfully. The courts did not find, as facts, either that the Unions engaged in the conduct that was the subject of the withdrawn claims or that they acted from an unlawful secondary motive.[9]

I. JURISDICTION

The Respondent, BE&K Construction Company, is a Delaware corporation with headquarters in Birmingham, Alabama. It is engaged in industrial general contracting throughout the United States. During the fiscal years

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[8] 10 Wright & Miller, Federal Practice and Procedure, Civil 2d, Sec. 2716.

[9] The court of appeals did state that "the unions encouraged work stoppages by unionized employees because of well-founded safety concerns[,]" and "[t]hat these activities were not undertaken to unionize this particular employer but in order to eliminate non-union shops altogether by making an example of BE&K does not matter." USS-POSCO Industries and BE&K Construction Co. v. Contra Costa County Building & Construction Trades Council, AFL-CIO, et al., 31 F.3d 800, 809 (9th Cir. 1994). Although those statements might appear to be factual findings, we doubt the court meant them as such. Elsewhere, the court referred to the Unions' alleged conduct, and it did not indicate any basis for doing otherwise in the case of the quoted material. We think the court of appeals engaged in inartful drafting rather than fact-finding in the quoted passages.

immediately preceding the filing of each of the charges and preceding the date of the complaint, the Respondent annually provided services valued in excess of $50,000 to customers located outside the State of Alabama. The Respondent admits, and we find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that each of the Unions is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

USS-POSCO Industries (UPI) is a partnership formed by USX Corporation and Pohang Iron and Steel Company to modernize and operate a steel facility in Pittsburg, California. UPI awarded a construction contract to modernize that facility to the Respondent, which is a nonunion contractor. The Respondent formed a joint venture with Eichleay Constructors, Inc. (ECI) to perform the contract.

After the contract was awarded, the Unions allegedly began a campaign against the Respondent. According to the Respondent, that campaign was aimed at forcing UPI to enter into an unlawful prehire agreement in violation of Section 8(e), forcing UPI to cease doing business with the Respondent, and ultimately eliminating nonunion employers from the construction market in Contra Costa County and elsewhere in California.

On September 21, 1987, the Respondent and UPI filed suit under Section 303 of the Act in the U.S. District Court for the Northern District of California.[10] The complaint alleged that the Unions

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[10] USS-POSCO Industries and BE&K Construction Co. v. Contra Costa County Building & Construction Trades Council, AFL-CIO, et al., No. C-87-4829 DLJ.

* Advocated the adoption and enforcement of a toxic waste ordinance in Contra Costa County, which would impede the progress of the modernization project, without any genuine belief that the project would harm the environment;

* Picketed and handbilled at the plaintiffs' premises without disclosing their identities or the true nature of their dispute with the plaintiffs, and induced and encouraged employees of the Respondent's subcontractors to engage in a strike at the project;

* Filed, in bad faith, a lawsuit in California state court (the Pile Drivers suit) alleging, among other things, violations of California's Health and Safety Code; and

* Initiated collective bargaining grievance proceedings against ECI under authority of collective-bargaining agreements that did not apply to ECI.

The complaint alleged that the Unions' conduct violated Section 8(b)(4)(ii)(A) and (B).

The Unions filed motions to dismiss or for summary judgment on three of the plaintiffs' four claims. The Unions argued that lobbying for the toxic waste ordinance and filing the Pile Drivers suit were protected by the First Amendment. They also argued that because the grievance and arbitration process is the preferred method of resolving labor disputes, resort to those proceedings should not be found unlawful.

On July 29, 1988, the court granted the Unions' motions in part and dismissed the allegations relating to lobbying and grievance filing. The court found that advocacy of the toxic waste ordinance and lobbying for its enforcement against the plaintiffs were protected by the First Amendment and did not

constitute unfair labor practices.[11] Concerning the Unions' grievance filing, the court noted that the grievances against ECI had been successful and that there was no contention that the provisions of the collective-bargaining agreement that the Unions sought to enforce were illegal. The court found it proper to allow further time for discovery on the claim relating to the Pile Drivers suit and denied without prejudice the Unions' motion to dismiss that claim.

On October 3, 1988, the plaintiffs filed an amended complaint for damages and injunctive relief. The amended complaint again alleged that the Unions' conduct violated Section 8(b)(4)(ii)(A) and (B). It also added the allegation that the Unions' conduct violated Sections 1 and 2 of the Sherman Act, and demanded treble damages and injunctive relief.

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[11] 692 F. Supp. 1166. The court relied on the Noerr-Pennington doctrine, which holds that petitioning the government does not violate the Sherman Antitrust Act, 15 U.S.C. 1 et seq., unless the petitioning is a sham-i.e., in reality an attempt to interfere directly with competitors' business relationships and not a genuine effort to influence legislation and law enforcement practices. See Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965). The court noted that Noerr-Pennington had been adapted to the labor law context in Bill Johnson's, in which the Supreme Court held that filing a well-founded state court lawsuit does not constitute an unfair labor practice. 692 F.Supp. at 1169. It also observed that the "sham" exception includes instituting baseless, repetitive claims in an effort to bar competitors from meaningful access to courts and administrative agencies. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). As there was no allegation that the Unions' activities were other than a genuine effort to influence legislation and law enforcement practices, or that the plaintiffs were denied meaningful access to present their own views before the Contra Costa County Board, the court found that they did not come within the sham exception to Noerr-Pennington. 692 F. Supp. at 1170.

The Unions moved for partial summary judgment, for dismissal of the amended complaint, and for sanctions. On May 1, 1989, the court granted the Unions' motion for partial summary judgment with regard to the plaintiffs' claim based on the Pile Drivers suit.[12] The court first noted that the plaintiffs had improperly sued even the Unions that were not parties to the Pile Drivers suit, and dismissed the suit against those Unions.[13] As to the remaining Unions, the court found, on the basis of discovery that had taken place since it issued the previous order, that the plaintiffs had failed to prove that the Pile Drivers suit lacked a reasonable basis in law. Although the Unions had not prevailed on the merits (the state court denied their motion for a temporary restraining order and for a preliminary injunction), the court noted that after the Pile Drivers suit was filed, the Federal Occupational Safety and Health Administration had investigated the jobsite and found a number of safety and health violations. As it found no genuine issue of material fact on the issue of health and safety problems on the jobsite at the time the Unions filed their suit, the court found that the plaintiffs had offered no evidence to support a finding that the Unions' suit lacked a reasonable basis in fact and law. The court therefore dismissed the plaintiffs' claim regarding the filing of the Pile Drivers suit.[14]

Turning to the amended complaint, the court held that the plaintiffs were within their rights in filing an amended complaint, but not in restating claims on which summary judgment had already been granted. The court therefore granted the Unions' motion to strike or dismiss the amended

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[12] 721 F.Supp. 239.

[13] Id. at 241.

[14] Id. at 241-242.

complaint, but allowed the plaintiffs to file a revised amended complaint.

On May 22, 1989, the plaintiffs filed a second amended complaint, including allegations of all the dismissed claims, and adding a claim under the Clayton Act.[15] The plaintiffs stated that they were realleging the previously dismissed claims solely in order to preserve their right to appeal under their understanding of controlling Ninth Circuit precedent. In support of the complaint, the plaintiffs alleged a number of actions on the part of the Unions that they had not alleged in the original complaint. Those actions included

* Automatic petitioning of governmental entities for delay and harassment purposes, regardless of the merits of the petitions;

* Interfering with UPI's attempts to obtain necessary building permits;

* Instigating violent civil disorders at the UPI construction site;

* Filing and prosecuting a series of overlapping, repetitive, and sham lawsuits against the plaintiffs and others, without any reasonable expectation of success on the merits, simply to harass the defendants and to defeat the project through delay and inflation of costs;

* Making known to all interested parties that the Unions intended to file such suits and protests, but that they would withdraw and refrain from filing such actions if UPI and the Respondent would agree to use only union labor.

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[15] 15 U.S.C. 15 and 26.

The Unions moved to strike or dismiss the second amended complaint and for sanctions. On August 24, 1989, the court granted the motion to strike with regard to the previously dismissed claims. It also rejected the plaintiffs' explanation for repleading the dismissed claims, and granted the Unions' motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure. On November 21, 1989, the court issued an order striking specific portions of the second amended complaint. In addition to the claims concerning lobbying for the toxic waste ordinance, filing the Pile Drivers suit, and grievance filing against ECI, the stricken paragraphs included those related to automatic petitioning of governmental entities, automatic protests of permits, and interference with UPI's efforts to obtain building permits.

On March 23, 1990, UPI moved for voluntary dismissal, with prejudice, of all its claims against the Unions. On March 27, 1990, the court granted the motion.

On June 8, 1990, the district court granted the Unions' motion to limit discovery concerning the Respondent's antitrust claim.[16] The court found that the statutory labor exemption to the antitrust laws, which does not apply to concerted action or agreements between unions and "non-labor parties," would exempt the Unions' conduct from antitrust liability unless the Respondent could show both a combination with non-labor groups and an illegitimate purpose in that combination. Accordingly, the court limited discovery to the issue of whether the Unions combined with contractors, manufacturers, of other commercial entities involved in the same market for construction services as the Respondents, and whether any such combinations were for purposes other than organizing the Respondent's employees and maintaining area standards.

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[16] 134 LRRM 2590, modified 136 LRRM 2647 (July 26, 1990).

On July 25, 1991, the Unions moved for summary judgment on the Respondent's antitrust claim. The court granted the motion on September 5, 1991, noting that the Respondent had stated its nonopposition to the motion in light of the court's previous rulings.

In early 1992, the parties to the district court action entered into a stipulation that the Respondent's remaining claims for relief under Section 303 should be dismissed with prejudice. As part of the stipulation, the Respondent agreed to waive its right to appeal any matters contained in the claims that were not the subject of the court's previous orders.

On February 13, 1992, the court issued an order for the issuance of final judgment, noting that it had previously granted partial summary judgment in favor of the Unions on four of the Respondent's claims and that it had dismissed the other two claims with prejudice pursuant to the Respondent's motion for a voluntary dismissal with prejudice. The court thus ordered that final judgment should issue in favor of the Unions and against the Respondent, and that the Unions should recover their costs of the lawsuit.

The Respondent appealed to the United States Court of Appeals for the Ninth Circuit. On July 26, 1994, the court of appeals affirmed the district court's decision granting summary judgment in favor of the Unions on the Respondent's antitrust claim.[17] The court of appeals held, however, that the district court had erred in finding that to overcome the statutory labor exemption to the antitrust laws,

[17] 31 F.3d 800. Although the Respondent's original and amended notices of appeal indicated that other issues were being appealed, the court stated that the Respondent was actually appealing only the dismissal of its antitrust claims and the district court's imposition of sanctions. 146 LRRM at 2962.

the Respondent had to prove both that the Unions had combined with nonlabor groups and that the combination had an illegitimate purpose. The court of appeals therefore held that the lower court had erred in limiting discovery to the former element, because the Respondent could have established an antitrust violation by proving that the Unions' actions had an illegitimate purpose, even if they were not taken in concert with nonlabor groups. The court found a strong presumption that some of the allegedly unlawful actions-e.g., picketing and handbilling for organizing purposes, encouraging work stoppages over safety issues-were protected from antitrust liability. "More troublesome" were the allegations that the Unions automatically protested permits sought by the Respondent, lobbied for the passage of the toxic waste ordinance and for its enforcement against the Respondent, and brought frivolous lawsuits. The court found that such conduct is not per se exempt from the antitrust laws even if engaged in in pursuit of traditional union interests.

The court held, however, that the district court's error was harmless, because the Unions' actions were protected from antitrust liability under the First Amendment under the Noerr-Pennington doctrine. The court found that the Unions' conduct did not lose its protection under the "sham" exception to Noerr-Pennington. To come within the "sham" exception, the court held, the Unions' conduct must have been both objectively baseless, in the sense that no reasonable litigant could realistically expect to prevail on the merits, and intended to interfere directly with the Respondent's business relationships.[18] Because the Respondent alleged that the Unions had brought a whole series of legal actions without regard for the merits, the court found, the inquiry must be whether the actions were filed not

[18] See California Motor Transport, supra, and Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49 (1993).

out of a genuine interest in redressing grievances, but essentially for purposes of harassment; thus, the Respondent's allegations, if proved, would overcome the Unions' Noerr-Pennington defense. The court found that the Unions' conduct had not lost its protection, however, because more than half of the actions filed by the Unions had proved successful. The court was unable to reconcile that relatively high "batting average" with the Respondent's contention that the actions were filed without regard to the merits.

The court of appeals also reversed the district court's award of Rule 11 sanctions. It held that although the plaintiffs were wrong in believing that they were required to replead the dismissed claims in order to preserve those issues for appeal, their basis for that belief was not frivolous.

B. Discussion

The complaint alleges that the Respondent violated Section 8(a)(1) by bringing a meritless suit against the Unions to enjoin them from engaging in protected concerted activity and to recover damages from them. Thus, our disposition of this case turns on the application of principles set forth in Bill Johnson's Restaurants.

In Bill Johnson's, the Supreme Court held that the Board may not enjoin the prosecution of a pending state court suit alleged to have been filed with a retaliatory motive unless the suit lacks a reasonable basis in fact and law.[19] While acknowledging the Board's strong interest in preventing interference with protected Section 7 rights, the Court said that this interest must be balanced against two countervailing

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[19] 461 U.S. at 743. Exceptions to that principle, not relevant to this proceeding, are suits that are claimed to be beyond the jurisdiction of state courts because of federal preemption and suits that have objectives that are illegal under Federal law. Id. at 737-738 fn. 5.

interests: the First Amendment right of access to the courts and the States' interest in protecting the health and welfare of their citizens. Thus, if the state court suit has a reasonable basis, the Board may not issue an order directing that the suit be withdrawn, but rather must stay its hand and await the results of the state court adjudication with respect to the merits of the suit.[20]

On an entirely different footing, however, are suits that have been litigated to completion, for at that point the plaintiff has had his day in court and the state's interest in providing a forum for its citizens has been vindicated.[21] If the suit has resulted in judgment in favor of the plaintiff (the Respondent in the unfair labor practice case), then the unfair labor practice complaint must be dismissed, "for the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice."[22] However, the Court said, if judgment has gone against the plaintiff, or the suit has been withdrawn or has been otherwise shown to be without merit, then the unfair labor practice proceeding may go forward. If the Board finds that the suit was filed with retaliatory intent, it may find a violation and order appropriate relief.[23] Moreover, the suit's having been found unmeritorious is a factor that the Board may take into account in determining whether it was filed in retaliation for the exercise of Section 7 rights.[24]

Notwithstanding the distinction clearly drawn by the Court between the standard that must be met to enjoin the prosecution of a pending lawsuit, and the standard that must be met to find an unfair labor practice once the lawsuit has

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[20] Id. at 749
[21] Id. at 747.
[22] Id.
[23] Id. at 747, 749.
[24] Id. at 747.

been finally adjudicated, the Respondent argues that its suit cannot be deemed to lack merit if there was a reasonable basis for pursuing it. In support of this proposition, the Respondent cites the Supreme Court's holding in Professional Real Estate Investors that a suit cannot be deprived of antitrust immunity as a sham unless it is "objectively baseless."[25] We reject this contention. In Bill Johnson's, as we have stated, the Supreme Court held that the Board may not enjoin the prosecution of an allegedly retaliatory state court lawsuit unless the suit lacks a "reasonable basis." But once the suit has been adjudicated and the employer has lost, the Court continued, the Board may proceed to determine whether the suit was brought with retaliatory motive and thus violated the Act. The Board has interpreted that holding as meaning that, even if an employer had a "reasonable basis" for bringing the suit, the suit may still be found unlawful if the employer withdraws the suit or loses on the merits and the Board finds that it brought the suit out of a desire to retaliate against protected activity.[26] That principle squarely applies here.

The contention that Professional Real Estate Investors requires a different result has already been specifically rejected by the Ninth Circuit Court of Appeals. In Diamond Walnut Growers v. NLRB,[27] the court reaffirmed the distinction between pending suits, which can be enjoined

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[25] Professional Real Estate Investors v. Columbia Pictures Industries, supra at 60.

[26] See, e.g., Machinists Local 91 (United Technologies), 298 NLRB 325, 326 (1990), enfd. 934 F.2d 1288 (2d Cir. 1991), cert. denied 502 U.S. 1091 (1992); Operating Engineers Local 520 (Alberici Construction), 309 NLRB 1199, 1200 (1992), enf. denied on other grounds 15 F.3d 677 (7th Cir. 1994); Summitville Tiles, 300 NLRB 64, 65 and fn. 6 (1990); Vanguard Tours, 300 NLRB 250, 255 (1990), enf. denied in relevant part 981 F.2d 62 (2d Cir. 1992).

[27] 53 F.3d 1085 (9th Cir. 1995).

only on a showing that they lack a reasonable basis, and suits that have been adjudicated adversely to the employer, which may be found unlawful if filed with retaliatory intent. The court held that Professional Real Estate Investors and similar cases did not alter the Supreme Court's approach to allegedly retaliatory lawsuits under Section 8(a)(1) as announced in Bill Johnson's. We agree with the court, and we reject the Respondent's suggestion that we revisit this settled area of the law.

Applying these principles to the circumstances of this case,[28] we note that the General Counsel issued the complaint in this case after the Respondent's suit had been adjudicated and its appeals had run their course. The issue here, therefore, is not whether the Respondent's suit lacked a reasonable basis, but whether it lacked merit (and, if it lacked merit, whether it was filed with a motive to retaliate against the Unions for engaging in protected conduct).

1. Did the Respondent's district court suit lack merit?

In deciding whether the suit lacked merit, we address first the question of the deference to be accorded in this proceeding to the federal courts' rulings on the merits of Respondent's suit.

The Supreme Court in Bill Johnson's treated the state court's final disposition of the state court suit as determinative on the

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[28] Although Bill Johnson's involved a state court lawsuit, the Board has applied its principles to cases involving allegedly retaliatory federal court suits as well. See, e.g., Grinnell Fire Protection Systems Co., 328 NLRB No. 76 (1999); BASF Wyandotte Corp., 278 NLRB 173, 181 and n. 26 (1986). In applying those principles here, we note that the First Amendment right of access to the courts, which concerned the Court in Bill Johnson's, is implicated just as strongly when the lawsuit at issue is a federal court suit as it is when the suit at issue is a state court suit.

question of whether the suit was meritorious. Thus, the Court explained, if the employer prevails in the state court suit and obtains judgment against the employees, he should also prevail before the Board and the complaint should be dismissed, "for the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice."[29] By the same token, however,

> [I]f judgment goes against the employer in the state court . . . or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the . . . unfair labor practice case. The employer's suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' Sec. 7 rights.[30]

In this case, as we have noted, the Respondent sued in federal rather than state court, and its claims alleged violations of federal law rather than of state law. However, we see no reason not to regard the rulings of the federal courts here as equally determinative on the question of whether the Respondent's federal court lawsuit lacked merit for purposes of a Bill Johnson's analysis.

As antitrust law is primarily the concern of the federal courts and not of the Board, we do not hesitate to defer to the courts' determinations with regard to the merits of the antitrust claims in the Respondent's suit. We acknowledge that the Section 303 claims stand on somewhat different footing, inasmuch as they involve an issue over which the Board and the courts have concurrent jurisdiction: whether the Unions engaged in conduct which violates Section 8(b)(4) of the

[29] 461 U.S. at 747.

[30] Id. (emphasis added).

Act.[31] However, because the Respondent here elected to pursue its 8(b)(4) claims against the Unions in the form of a Section 303 suit in federal court rather than as an unfair labor practice charge before the Board, we think it appropriate to look to the federal courts' disposition of those claims as well as the antitrust claims as the test of whether the claims were meritorious.

a. The adjudicated claims. As we have discussed, the district court granted the Unions' motions for partial summary judgment and dismissed the Respondent's Section 303 claims based on the Unions' lobbying for passage and enforcement of the toxic waste ordinance, their prosecution of the Pile Drivers suit, and their institution of grievance and arbitration proceedings against ECI.[32] The court also granted partial summary judgment in favor of the Unions and dismissed the Respondent's antitrust claim, and the court of appeals affirmed, albeit on a different theory. Thus, with respect to those portions of the Respondent's suit that were actually adjudicated, the court rendered judgment for the Unions and against the Respondent. Accordingly, those portions of the

[31] Sec. 303 provides that

> (a) It shall be unlawful, for the purpose of this section only, . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the . . . Act.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit.

[32] As noted above, the district court also struck a number of portions of the second amended complaint that were related to the claims as to which it granted partial summary judgment. We consider those stricken portions of the complaint to have been adjudicated as well as the claims themselves.

Respondent's suit were unmeritorious within the meaning of Bill Johnson's.

The Respondent contends, however, that its suit must be found meritorious. It argues that it actually prevailed, at least in part, because the court of appeals reversed the district court concerning both the standard to be applied in determining whether the Unions' actions lost their protection under the antitrust laws and the matter of sanctions. The Respondent also urges that its suit cannot be found to be without merit because it was not objectively baseless in the sense that no reasonable litigant could realistically expect to succeed on the merits.

We reject the Respondent's contentions as lacking in merit. The first, that the court of appeals' decision vindicated important aspects of the Respondent's claims, is bereft of either logical or factual support. All of the Respondent's claims that were litigated were dismissed; judgment was entered against the Respondent and in favor of the Unions; and the Unions were awarded costs as the prevailing parties.[33] That the court of appeals agreed with the Respondent concerning certain aspects of antitrust law is beside the point, as is its holding that the Unions might have been guilty of antitrust violations had they, in fact, engaged in a pattern of suit-filing without regard to the merits. The point is that the Respondent alleged that the Unions had violated the antitrust laws by engaging in such a pattern of conduct, and the court found that they had not. That it reached that conclusion on a different theory from that of the district court is irrelevant.

The Respondent also argues that it prevailed in part because the court of appeals' ruling will dissuade the Unions from engaging in unlawful conduct in the future. That argument,

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[33] Rule 54(d), Fed. R. Civ. P., provides for the award of costs to the prevailing party in a civil action.

however, is both speculative and irrelevant to the issue of which party prevailed in the district court action. To "prevail" in litigation, a party must do more than obtain a ruling from the court as to what the law is. The party must also persuade the court that the law, as applied to the facts in the case, compels judgment in its favor on at least some point.[34] In that respect, the Respondent failed at every turn.

Equally unavailing is the Respondent's contention that it "prevailed" in part because the court of appeals reversed the district court's award of sanctions. The court in no sense endorsed the merits of the Respondent's suit. Indeed, its ruling in this regard concerned only the consequences to the Respondent of pursuing an unmeritorious suit. The court simply found that, having lost on the merits regarding certain of its claims, the Respondent did not act frivolously by repleading those claims in the belief that it had to do so in order to preserve those issues for appeal. In no way can this ruling on a procedural issue be read as supporting the Respondent's present contention that its suit had substantive merit.

b. The voluntarily dismissed claims. Not all the Respondent's claims were submitted to the courts for a decision on the merits. Some, alleging (inter alia) unlawful picketing, encouraging employees to engage in secondary strikes, and violence, were voluntarily withdrawn and dismissed with prejudice.

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[34] See City of Chanute, Kansas v. Williams Natural Gas Co., 31 F.3d 1041, 1048-1049 (10th Cir. 1994), cert. denied 513 U.S. 1191 (1995) (cities were not "substantially prevailing parties" for purposes of Clayton Act, despite district court's having originally granted preliminary injunction against pipeline and cities' having later entered into stipulation agreement with pipelines granting certain rights to cities, where cities' antitrust damage claims were fully adjudicated on the merits and rejected.)

In Bill Johnson's, the Supreme Court indicated that the withdrawal of a claim could be regarded as equivalent to an showing that it lacks merit:

> If judgment goes against the employer in the state court, however, or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the state in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the ... unfair labor practice case.[35]

Further, under Rule 41 of the Federal Rules of Civil Procedure, dismissal of a complaint with prejudice at the plaintiff's request acts as a complete adjudication. Unless otherwise provided for by the court, such a dismissal is subject to the rules of res judicata and is binding on the parties and their privies.[36] Accordingly we find that these claims that the Respondent voluntarily withdrew with prejudice were, for Bill Johnson's purposes, unmeritorious.[37]

2. Was the Unions' conduct protected by Section 7?

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[35] 461 U.S. at 747 (emphasis added).

[36] Wright and Miller, Federal Practice and Procedure, Civil 2d, Secs. 2364, 2367, 2373.

[37] In Vanguard Tours, 300 NLRB at 255, the Board declined to read the Supreme Court's statement in Bill Johnson's as suggesting that the withdrawal of a lawsuit is in all circumstances equivalent to a showing of lack of merit. The Board found, under the circumstances presented in Vanguard Tours, that the employer's withdrawal of its suit was presumptively an admission that the suit lacked merit, and that the employer had failed to rebut the presumption. In Vanguard Tours, however, unlike this case, there was no indication that the employer had withdrawn its suit with prejudice. We find the employer's voluntary withdrawal of its claim with prejudice to be an admission that the claims lacked merit.

Although the courts dismissed most of the Respondent's claims against the Unions, the fact that those claims were dismissed does not in and of itself mean that the Unions' actions were necessarily protected by Section 7. Some kinds of lawful concerted conduct do not enjoy the protection of the Act.[38] Before we can determine whether the Respondent's suit violated the Act, then, we must determine whether the Unions' actions were affirmatively protected by Section 7.

Can union conduct ever be protected?

The Respondent contends that the conduct in question was unprotected because it was engaged in by the Unions, rather than by employees. The Respondent's premise is that only employees-not unions-have Section 7 rights, and thus that its suit could not violate Section 8(a)(1) because it was not in retaliation against employee protected activity. The Respondent relies on Lechmere, Inc. v. NLRB,[39] in which the Supreme Court stated that "the NLRA confers rights only on employees, not on unions or their nonemployee organizers."[40] The Respondent also reasons that, because the Unions did not represent its employees, their actions were unprotected. We find no merit to either contention.

To begin with, we do not read the Supreme Court's language quoted above in as sweeping a fashion as the Respondent urges. Lechmere was concerned with one narrow aspect of union activity-the attempt by union organizers who were not employees of the respondent employer to engage in

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[38] E.g., NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard Broadcasting), 346 U.S. 464 (1953) (disloyally disparaging employer's product).

[39] 502 U.S. 527 (1992).

[40] Id. at 532 (emphasis in original).

organizing activity on that employer's private property. The Court reaffirmed its earlier holding in NLRB v. Babcock & Wilcox Co.,[41] which distinguished between the Section 7 right of employees of the employer to engage in self-organizational activity on the employer's property and the (much more restricted) right of nonemployee organizers, to whom the Court held that Section 7 applies "only derivatively," to engage in trespassory activities on the same property.[42] The Court noted its holding in Babcock that an employer may have to allow nonemployee organizers on its property if the union has no reasonable alternative means of reaching the employees with its message.[43] The Court also did not question the exception to the general rule set forth in Babcock & Wilcox that an employer may not discriminate against unions in denying access to its property.[44] In our view, the Court's reaffirmance in Lechmere of the right of nonemployee union organizers to gain access to an employer's property if no reasonable alternative means of reaching the employees exist, together with its failure to question the proposition that employers may not discriminatorily deny unions access to their property, negate any suggestion that the Court intended to hold that union conduct is never protected by the Act.

Our confidence in this reading of Lechmere is bolstered by the language and purpose of the Act itself. Section 1 sets forth the Act's raison d'etre:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by

[41] 351 U.S. 105 (1956).
[42] 502 U.S. at 533.
[43] 502 U.S. at 533-534, citing Babcock, 351 U.S. at 112.
[44] 351 U.S. at 112.

protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

To those ends, Section 7 provides that

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]

The Act thus unequivocally assures employees of the right to join unions and to engage in "other concerted activities" for "other mutual aid or protection." It would be a curious and myopic reading of these core provisions of the Act to hold that, although employees are free to join unions and to work through unions for purposes of "other mutual aid or protection," the conduct of the unions they form and join for those purposes is not protected by the Act. Under that reasoning, conduct that is protected when engaged in by two or more employees together would lose its protection if engaged in by the employees' union on their behalf. We decline the Respondent's invitation to read the Act in such a perverse way.

The Respondent's contention is also contrary to Board and court precedent. In Diamond Walnut Growers,[45] both the Board and the court of appeals found that the employer violated Section 8(a)(1) by bringing a meritless libel suit against the union with retaliatory motive. The employer argued that it could not have violated Section 8(a)(1) because it sued only the union, not individual employees. Both the Board and the court squarely rejected that argument. The

[45] 312 NLRB 61 (1993), enfd. 53 F.3d 1085 (9th Cir. 1995).